A

R Renuga a/p Ramayah v Ramesh a/l Sengaran

B HIGH COURT (SHAH ALAM) — DIVORCE PETITION NO BA-33–382–07 OF 2019
JULIE LACK J
6 OCTOBER 2023

C *Family Law — Divorce — Children — Divorce Court granted respondent-husband ('RH') supervised access to child of marriage for two hours every Saturday at a named restaurant — Petitioner-wife ('PW') applied to vary access order so that access was only permissible 'if child wished to meet RH' — Whether application was vague and if granted could be abused to deny RH of*
D *any chance to be with the child — Whether PW failed to prove allegation that child refused to meet with RH — Whether PW had not shown what steps she took to encourage child to be with RH on the access days — Whether PW had not proven on balance of probabilities any material change in circumstances to warrant*
E *variation to access order*

Pursuant to granting a divorce to the parties herein, the High Court granted the petitioner wife ('PW') sole guardianship, custody, care and control of the ten-year-old child of the marriage ('the child') whilst the respondent husband
F ('RH') was allowed supervised access to the child every Saturday from 5pm to 7pm at a named restaurant in a public place. Vide the instant application, made pursuant to ss 96 and 97 of the Law Reform (Marriage and Divorce) Act 1976, PW sought to vary the access order by adding to it the words 'if the child wished to meet with RH'. PW said she was compelled to seek the variation because the
G child had persistently refused to alight from the car to meet RH when she took the child to the meet-up venue. PW said RH would merely sit where he was in the restaurant and not make any effort to approach the child. PW said although she had informed RH about the problem through his solicitors, he never replied or took any proactive steps to obtain access to the child. Although he
H acknowledged the child's refusal to meet him, RH opposed PW's instant application on the ground she had not proven the various allegations she had made in the application nor shown that any material change in circumstances had taken place to warrant a variation of the access order. RH submitted that PW's application was not in the best interests of the child and seemed to be an
I attempt to deny him of access in order to 'get back at him'.

Held, dismissing PW's application:

(1) PW had failed to prove on balance of probabilities any of the grounds she had relied upon for her application or that there was any material change in circumstances to warrant a variation of the access order (see para 40).

(2) There was no cogent or conclusive evidence to show that RH did not make any effort to build a relationship with the child. The fact that he turned up at almost all the appointments showed that he had tried his best. The court agreed with RH that the supervised access order should not be disturbed as it was achieved by the consent of the parties (see paras 27 & 29).

(3) PW had not satisfied the court as to: (a) why the child was so adamant against meeting her father as the meeting was only for two hours a week and under PW's supervision; (b) any steps PW had taken to persuade the child to see the father. There were no particulars as to what was told or explained to the child in order to obtain her co-operation to meet RH since PW, being the sole guardian and custodian of the child, had the responsibility of preparing the child mentally and emotionally to meet RH; and (c) her averment that the child was traumatised and stressed. No medical proof was adduced to show that the child had suffered stress and/or emotional issues as a result of this issue (see paras 32 & 34).

(4) The variation sought by PW was vague and open-ended and was open to abuse and manipulation to restrict RH from having any meaningful relationship with the child at any time in the future. The court could not lend itself to such an unfair condition. It was not far off the mark for RH to contend that there might be cases where the views expressed by a child were not his/her own but the views of one parent 'assiduously instilled' into him/her. In the present case, it seemed unreasonable for the child to cry and resist access to RH since she was not being left alone with him. The child's extreme reaction suggested that she was not yet capable of expressing an independent opinion or to appreciate the consequences of her wishes (see paras 33, 35 & 38).

(5) At no time during the divorce proceedings and before the access order was made did PW beseech the court to allow access to RH only if the child wished it. She had consented to the supervised access order. If she was dissatisfied with the order, she should have appealed against it within the stipulated time (see para 37).

(6) It was pertinent to note that RH had not protested or raised any objections to the fact that the child refused to meet him. It appeared that he was reconciled to the state of matters and was prepared to be patient until the child was ready to meet him. Therefore, PW should not be overly anxious that the access visits had been unsuccessful thus far (see para 39).

[Bahasa Malaysia summary

Selepas memberikan perintah kepada pihak-pihak, Mahkamah Tinggi memberikan hak jagaan dan kawalan tunggal ke atas anak perkahwinan yang berusia sepuluh tahun ('kanak-kanak itu') kepada pempetisyen isteri ('PI') manakala responden suami ('RS') dibenarkan akses yang diselia terhadap kanak-kanak itu setiap hari Sabtu dari 5 petang hingga 7 malam di restoran di tempat awam. Melalui permohonan ini, yang dibuat menurut ss 96 dan 97 Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976, PI memohon untuk mengubah perintah akses dengan menambah perkataan 'sekiranya kanak-kanak ingin bertemu dengan RS'. PI berkata dia terpaksa memohon perubahan itu kerana kanak-kanak itu enggan turun dari kereta untuk bertemu RS ketika dia membawa kanak-kanak itu ke tempat pertemuan. PI berkata RS hanya akan duduk di tempat dia berada di restoran dan tidak membuat sebarang usaha untuk mendekati kanak-kanak itu. PI berkata walaupun dia telah memaklumkan kepada RS mengenai masalah itu melalui peguamcaranya, dia tidak pernah menjawab atau mengambil sebarang langkah proaktif untuk mendapatkan akses kepada kanak-kanak itu. Walaupun dia mengakui keengganan kanak-kanak itu untuk berjumpa dengannya, RS membantah permohonan PI ini atas alasan dia tidak membuktikan pelbagai dakwaan yang dalam permohonan itu atau menunjukkan bahawa terdapat sebarang perubahan material dalam keadaan yang telah berlaku untuk mewajarkan perubahan perintah akses. RS menghujahkan bahawa permohonan PI bukan demi kepentingan terbaik kanak-kanak itu dan seolah-olah merupakan percubaan untuk menafikan akses kepadanya untuk 'membalas dendam'.

Diputuskan, menolak permohonan PI:

(1) PI telah gagal membuktikan atas imbangan kebarangkalian atas alasan-alasan permohonannya atau terdapat sebarang perubahan material untuk memboleh perintah akses diubah (lihat perenggan 40).

(2) Tiada keterangan yang meyakinkan atau konklusif untuk menunjukkan bahawa RS tidak berusaha untuk memperbaiki hubungan dengan kanak-kanak itu. Fakta bahawa dia hadir pada hampir semua temu janji menunjukkan bahawa dia telah mencuba yang terbaik. Mahkamah bersetuju dengan RS bahawa perintah akses yang diselia tidak boleh diganggu kerana ianya dicapai dengan persetujuan pihak-pihak (lihat perenggan 27 & 29).

(3) PI tidak menyakinkan mahkamah mengenai: (a) mengapa kanak-kanak itu sangat tidak mahu untuk berjumpa ayahnya sedangkan temu janji hanya untuk dua jam sahaja setiap minggu dan di bawah pengawasan PI; (b) sebarang langkah yang PI telah diambil untuk memujuk kanak-kanak itu berjumpa dengan bapanya. Tiada butiran mengenai apa yang diberitahu atau dijelaskan kepada kanak-kanak itu untuk mendapatkan

kerjasama beliau untuk bertemu dengan RS kerana PI, sebagai penjaga dan penjaga tunggal kanak-kanak itu dan mempunyai tanggungjawab untuk menyediakan kanak-kanak itu dari segi mental dan emosi untuk bertemu RS; dan (c) pernyataannya bahawa kanak-kanak itu trauma dan tertekan. Tiada keterangan perubatan dikemukakan untuk menunjukkan bahawa kanak-kanak itu telah mengalami tekanan dan/atau masalah emosi akibat isu ini (lihat perenggan 32 & 34).

(4) Perubahan perintah yang dipohon oleh PI adalah kabur dan terbuka dan cenderung kepada penyalahgunaan dan manipulasi untuk menyekat RS daripada mempunyai hubungan yang bermakna dengan kanak-kanak itu pada bila-bila masa pada masa hadapan. Mahkamah tidak boleh membiarkan keadaan yang tidak adil seperti itu. Tidak melampau bagi RS untuk berhujah bahawa segala yang dikatakan oleh kanak-kanak itu mungkin bukan daripadanya tetapi dari ibu yang menghasutnya. Dalam kes ini, tidak munasabah bagi kanak-kanak itu untuk menangis dan menolak akses kepada RS kerana dia tidak ditinggalkan bersendirian dengannya. Reaksi melampau kanak-kanak itu menunjukkan bahawa dia belum mampu menyatakan pendapat bebas atau memahami akibat daripada perbuatannya (lihat perenggan 33, 35 & 38).

(5) Sepanjang prosiding perceraian dan sebelum perintah akses, Pi tidak pernah memohon kepada mahkamah untuk membenarkan akses kepada RH hanya ketika kanak-kanak itu menginginkannya. Dia telah bersetuju untuk perintah akses yang diselia. Sekiranya dia tidak berpuas hati dengan perintah itu, dia sepatutnya merayu dalam tempoh masa yang ditetapkan (lihat perenggan 37).

(6) Adalah penting untuk diperhatikan bahawa RS tidak pernah mengemukakan sebarang bantahan terhadap fakta bahawa kanak-kanak itu enggan berjumpa dengannya. Nampaknya dia telah menerima keadaan itu dan bersedia untuk bersabar sehingga kanak-kanak itu bersedia untuk bertemu dengannya. Oleh itu, PI tidak perlu untuk terlalu bimbang bahawa lawatan akses tidak berjaya setakat ini (lihat perenggan 39).]

Cases referred to

ABW v ABV [2014] 2 SLR 769, HC (refd)

Foo Kok Soon v Leony Rosalina [1998] MLJU 61; [1998] 4 CLJ Supp 289, HC (refd)

H (minors)(access), Re [1992] 1 FLR 148 (folld)

Leong Sam Moy v Low Chee Thiam [1996] MLJU 640; [1997] 2 CLJ Supp 212, HC (refd)

Mahabir Prasad v Mahabir Prasad [1981] 2 MLJ 326; [1981] CLJ Rep 182, FC (refd)

A *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; [1987] CLJ Rep 24, PC (refd)
YSL v CCS [2021] MLJU 1475; [2021] 1 LNS 1254, HC (refd)

Legislation referred to

B Law Reform (Marriage and Divorce) Act 1976 ss 96, 97

R Renuga Ramayah (R Renuga Ram & Co) for the petitioner.
Lucas Low Lay Hoe (Chee & Assoc) for the respondant.

C **Julie Lack J:**

INTRODUCTION

[1] This is an application by the petitioner wife dated 2 April 2023 D (encl 117) under ss 96 and 97 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') to amend/vary the decree nisi/order of court dated 31 October 2022. The decree nisi and order of court was recorded after a full trial conducted by the High Court in Shah Alam.

E **[2]** Pursuant to the order of court dated 31 October 2022, sole guardianship, custody, care and control of the child ('the child') (now aged ten) is granted to the petitioner wife. The respondent husband is given supervised access to the child on every Saturday from 5pm to 7pm at KFC, USJ 21, Subang Jaya. The respondent husband is also required to pay maintenance for the child as well as F arrears of maintenance with effect from the date of the filing of the divorce petition.

[3] For ease of reference and for clarity, the terms in the original order of court are reproduced below as follows:

G

1. Bahawa perkahwinan di antara Pempetisyen dan Responden dibubarkan dan Dekri Nisi dijadikan mutlak dengan serta merta.

2. Bahawa hak penjagaan, pemeliharaan, pengawalan (custody, care, control & guardianship) terhadap anak yang bernama KHERSINY NAIR A/P H RAMESH (NO. DAFTAR KELAHIRAN CW 07354 serta No MY KID: 130724–02–0118) ('Anak tersebut') yang dilahirkan pada 24/07/2013 diberikan sepenuhnya (sole custodian and guardianship) kepada Pempetisyen.

3. Bahawa Responden diberikan akses terkawal (supervised access) setiap I hari Sabtu pada pukul 5 petang sehingga 7 malam di KFC, USJ 21, Subang Jaya.

4. Bahawa Responden memberikan RM1,500-00 sebulan sebagai nafkah bagi Anak tersebut sehingga Anak tersebut habis belajar di tahap university dan bayaran dimasukkan ke dalam akaun bank Pempetisyen

Maybank: 102184006085 (R. Renuga A/P Ramayah) pada atau sebelum 7hb setiap bulan daripada tarikh perintah ini.

5. Bahawa Responden diperintah untuk membayar tunggakan nafkah Anak tersebut iaitu sebanyak RM1,500-00 sebulan bermula dari tarikh pemfailan petisyen perceraian bertarikh 12/07/2019 sehingga tarikh perintah ini.

6. Bahawa diperintahkan Kumpulan Wang Simpanan Pekerja (KWSP) Responden sebanyak 50% daripada jumlah baki simpanan tidak kurang daripada RM223,725.84 mengikut tarikh penyata KWSP yang telah diberikan oleh Responden bertarikh 08/12/2022 dan juga termasuk bagi apa-apa tambahan baki simpanan setakat tarikh perintah ini diamanahkan dan diberikan kepada anak tersebut apabila umur anak tersebut mencapai umur 18 tahun.

7. Tiada perintah bagi kos.

[4] Vide encl 117, the proposed amendment/variation as pleaded by the petitioner wife is as follows:

3. Bahawa Responden diberikan akses terkawal (supervised access) setiap hari Sabtu pada pukul 5 petang sehingga 7 malam di KFC, USJ 12, Subang Jaya *jika anak tersebut ingin berjumpa dengan responden*. (Emphasis added.)

[5] In other words, the petitioner wife is seeking to restrict access rights of the respondent husband to be further restricted to only if the child wished to see her father.

[6] On 27 July 2023 after hearing arguments by counsel for both parties, I dismissed encl 117 and these are my reasons.

BRIEF FACTS

[7] The petitioner wife and respondent husband were legally married on 9 April 2010 and have a daughter named the child. The petitioner wife is a practicing lawyer and is representing herself in this action whilst the respondent husband is a qualified engineer who presently does not have any permanent job.

[8] Due to their irreconcilable differences, the parties were granted a decree nisi by the High Court on 31 October 2022 and was made absolute on 21 December 2022. The petitioner wife was granted sole guardianship, custody, care and control of the child and the respondent husband was allowed supervised access to the child once every weekend on Saturday for a period of three hours from 5pm to 7pm at a public place.

[9] In obedience of the order of court dated 31 October 2019, the petitioner wife dutifully brought the child to the designed location to allow access to the respondent husband. To her consternation, the child refused to get down from the vehicle and meet the respondent. The child cried loudly and refused to meet the respondent even though the petitioner and her relatives tried to persuade her to do so. According to the petitioner wife she attempted many times to bring the child for access to the respondent husband but nothing could persuade the child to meet the respondent. The petitioner wife claimed that the respondent husband did not make any effort or bother to coax the child. Instead he stared angrily at the petitioner wife and continued to eat his meal at the KFC joint.

[10] On 26 November 2022 the petitioner brought the child to the same place but the respondent did not turn up and did not inform the petitioner that he was unable to attend. On other access times the respondent would be present but all he did was to take photographs at 5pm as a sign of 'log in' and 7pm as a sign of 'log out'. The respondent would spend the two hours of access time to enjoy his meal inside the KFC outlet while the child was outside sitting in the car.

[11] On 24 December 2022 the petitioner averred that the child refused to follow the petitioner for access and even locked herself inside the bedroom. The child told the petitioner that she would not leave the room even if the petitioner forced her. The petitioner wife has informed the respondent husband through his solicitors via email the child's refusal but no response has been forthcoming.

[12] According to the petitioner the child still refuses to meet the respondent hence this application was filed.

[13] For the purpose of hearing encl 117, the following cause papers were referred to:

1) notice of application — encl 117;
2) affidavit in support affirmed by the petitioner wife on 31 March 2023 (encl 118);
3) affidavit in reply affirmed by the respondent husband on 18 April 2023 (encl 123); and
4) affidavit in reply affirmed by the petitioner wife on 28 April 2023.

THE PARTIES CONTENTIONS

[14] The petitioner wife has contended that she has taken all reasonable steps to persuade the child to meet the respondent. The child has steadfastly refused to meet the respondent. The petitioner wife has emailed the respondent through his previous solicitors requesting to be given time in order for the child to calm down her emotions and feelings as well as to attempt alternative measures to overcome the predicament they faced. However, the respondent has not himself or through his solicitor replied to any of her emails and correspondences.

[15] The petitioner wife claimed that by his conduct the respondent husband did not love and did not seem to care about the child as he had never made any positive attempts to build a relationship with his only child since the child was born. He had never taken any effort to meet the child nor has he ever voluntarily requested to meet the child. He did not even file any interim application for child access prior to the filing of the divorce petition. To compound matters further the petitioner wife complained that the respondent husband until today has not paid a single penny towards the child's maintenance.

[16] The petitioner has pointed out that the child is now ten years old and she is at the stage where she wants to express her own wishes, emotions and feelings. She is no longer a little child and the petitioner is now requesting the court to accede to the child's wishes since access is a child's right and not one determined by the parents.

[17] In reply the respondent husband whilst acknowledging the child's refusal to meet him nevertheless opposed the petitioner wife's application for further restrictions of access primarily on the ground that she had failed to meet the threshold of proving that there was a material change in circumstances to warrant a variation of the order that was made. It was contended that the parties had mutually agreed to the terms of access and a consent order must rarely be disturbed unless there are executional circumstances that warrant the intervention of the court.

[18] It was further contended that the evidential burden lies on the applicant to satisfy the court on a balance of probabilities, that there is a material change of circumstances that warranted a change before the court will exercise its discretion. The respondent husband argued that the petitioner wife had failed to prove on a balance of probabilities all the allegations contained in her affidavit in support of the application. Instead it was argued that this was the petitioner wife's agenda to deny and deprive him of any right of access to the child.

[19] The respondent reiterated that access is the basic right of the child rather than the parent and urged the court to heed the advise given in the case of *Leong Sam Moy v Low Chee Thiam* [1996] MLJU 640; [1997] 2 CLJ Supp 212 where it was stated:

> Access is the basic rights of the children rather than the parent. The court must also consider whether the welfare of the child is prompted by access or the reverse and decide accordingly.

[20] In his reply the respondent husband whilst acknowledging that the wishes of the child must be considered contended that it did not mean that the court should only consider this one aspect and ignore the rest. It was also necessary to decide whether the child is of the age and maturity of being capable enough to express an independent opinion without being unduly influenced by her mother's opinions.

[21] The respondent husband contended that the application ought not to be allowed as the petitioner wife harboured resentment against him and was dissatisfied with the current arrangement on the supervised access to the respondent as ordered by the court in cl 3 of the order. It was contended that the petitioner was using the child as an excuse to deny and deprive the respondent of his right to access to the child and to get back at him. It was contended that the respondent will be prejudiced at the whims and fancies of the petitioner if the application were to be allowed. He reasoned that it was obvious and intentional that the petitioner wife is trying to circumvent the proper court process by filing this variation application under encl 117 instead of filing an appeal. Finally, it was stated that the variation sought was not in the paramount interest of the child

DECISION OF THIS COURT

[22] Sections 96 and 97 of the LRA are the relevant provisions of law pertinent to the present application.

Section 96 provides as follows:

> 96 Power for court to vary orders for custody and maintenance
>
> The court may at any time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

Section 97 states as follows:

> 97 Power for court to vary agreement for custody or maintenance

> The court may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of a child, whether made before or after the appointed date, notwithstanding any provision to the contrary in any such agreement, where it is satisfied that it is reasonable and for the welfare of the child so to do.

[23] Undisputed from the averments in the petitioner wife's affidavits and the submissions filed that she is solely relying on the 'material change in the circumstances' as her main reason to amend or vary the original order of court.

[24] What is defined of the term 'material change in circumstances' has been explained in the case of *YSL v CCS* [2021] MLJU 1475; [2021] 1 LNS 1254 where the High Court said that:

> [15] the term material change in the circumstances had been clarified in numerous cases including *Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah* [2006] 3 MLJ 184; [2006] 5 CLJ 318 where it was stated by Azahar Mohamed JC (as he then was), in the following passage:
>
> > 10. The meaning of the section is plain and very clear. It is apparent that under 3.96, in so far as it relates to the case at hand, there must be a material change in the circumstances in order for the court to vary or rescind any order for maintenance. The section says any 'material change' and not simply 'change'. There is no ambiguity whatsoever. *It means a change in an essential part* in considering whether there has been any 'material change' within the meaning of this section regard must be had to all the relevant circumstances, including, in the context of the present case, the judgment of Faiza Tamby Chik J. On a proper construction, the requirement in this section does impose a legal obligation on the defendant to prove on the balance of probability that there had been a material change in the circumstances as at 24 August 2001. There is no requirement at all for the plaintiff to disprove anything. (Emphasis added.)

[25] Therefore the burden to prove the said material change in circumstances is on the petitioner wife as she is the party who is moving this court to vary or amend the original order of court relating to access of the child.

[26] The evidence presented by the petitioner wife and respondent husband are on some parts particularly their respective negative behaviours quite conflicting. Having said this I am of the view that the correct approach to take is to ignore the disputed allegations and make the evaluation based on the undisputed facts. I find the advise given by Lord Templeman of the Privy Council in the case of *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; [1987] CLJ Rep 24 to be helpful and on point especially the part where he held:

> At the end of the day, the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are

A credibly denied by the respondent's affidavit, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must decide the fate of the petition by consideration of the undisputed facts.

B **[27]** Thus having examined the conflicting affidavits filed by the respective parties, it boils down to 'your version my version' without more. I find there are no cogent or conclusive evidence on a balance of probabilities to show that the respondent husband did not make any effort to build a relationship with his only child. The fact that he turned up at almost all the appointments showed that he tried his best. In respect of the complain that the respondent father did C not show up during his access time, I find that it was only one occasion and I am ready to accept his explanation on the absence.

D **[28]** In any event, I recognise that the most important factor for me to focus on is to consider the welfare of the child. This has to be the paramount consideration in which the court has to place emphasis on when it comes to matters concerning custody, care and control of the child (see *Mahabir Prasad v Mahabir Prasad* [1981] 2 MLJ 326; [1981] CLJ Rep 182).

E **[29]** I am of the considered opinion that the current access order should be left alone and in place. In arriving at my decision, I am mindful that such an order must rarely be disturbed and I agree with the respondent husband that the terms of the access should be maintained since these were achieved by the consent of the petitioner wife and the respondent husband together.

F

[30] I subscribe to the stand that the bond between a father and a child must not be torn asunder. Hence the purpose of allowing access to the father is to see that the child grows up loving him and being emotionally secure in the knowledge that she has not been abandoned or cast aside on account of the G divorce of the parents. I adopt the words of the English Court of Appeal in the case *Re H (minors) (access)* [1992] 1 FLR 148 where it was held that no court should deprive a child of access to either parent unless it was wholly satisfied that it was in the interests of the child that access should cease, and that was a conclusion at which the court should be extremely slow to arrive at.

H

[31] In the Singapore case of *ABW v ABV* [2014] 2 SLR 769, the High Court in its appellate jurisdiction from the Family Court has stated:

I [26] It has been said that the child is the unseen and unheard victim of a marital breakdown. The courts do their best to help minimize the negative impact of a divorce and we recognize that it must normally be in the child's interest to maintain a relationship with both the parents.

[32] The petitioner wife has not satisfied the court as to why the child is

adamantly against having access to her father. There is no averment as to how the petitioner had tried to persuade the child to see her father. No particulars were forthcoming as to what was told or explained to the child in order to obtain her cooperation to meet the respondent. Furthermore as cited by the petitioner herself, as the custodian and guardian of the child, she is the person who bears the responsibility to prepare the child mentally and emotionally in order for the child to be mentally and emotionally prepared to see and meet with her father.

[33] No reasons were given as to why the child was so resistant and adamant against spending only two hours per week with her father as he is no stranger to her. The extreme reaction exhibited by the child would suggest that she is not yet capable of expressing an independent opinion or to appreciate the consequences of her wishes. It seemed unreasonable for the child to cry and resist access with the respondent since she was not being left alone to meet with the respondent. After all said and done the access is a supervised access for only two hours and at all times she is accompanied by the petitioner.

[34] It was averred that the child was traumatised and stressed. However there is no medical proof from the petitioner that the child had suffered stress and/or emotional issues as a result of this issue.

[35] The respondent's suggestion that the wishes of the child is not the be all and end all for the court in deciding whether to allow the application or not is not without merits. It is unavoidable that children are naturally anxious not to offend the parent with whom they are living. The respondent's argument that there may be cases in which the views expressed by the child are not an independent exercise of her own will but merely the views of one parent 'assiduously instilled' into the child may not be far of the mark.

[36] In this regard reference is made to the case of *Foo Kok Soon v Leony Rosalina* [1998] MLJU 61; [1998] 4 CLJ Supp 289 in which RK Nathan J adopted the *Principles of Family Law* by SM Cretney (4th Ed):

> ... even if the two children were reluctant to visit the mother they ought to have been explained the order of the court. In fact, in this case having talked to the children I am more than convinced that without the interference of the plaintiff the two children would pose no problems on the question of access. It is axiomatic to refer to a passage from *Principles of Family Law* by SM Cretney (4th Ed) at p 334 which reads:
>
> > The courts regard the clear and positive views of a mature young person as a most important factor, but they do not, regard the views of the child as being conclusive. This is partly because children are naturally anxious not to offend the parent with whom they are living; and there may even be cases in which the views expressed by the child are not an independent exercise of his own will but merely

A the views of one parent 'assiduously instilled' into the child. But even if the court accepts that the child is expressing his own deeply held views it will not necessarily give effect to them, for it may take the view that the views expressed are manifestly contrary to the child's long-term interest ...

B **[37]** It is observed too that the petitioner wife did not at any time apply to the learned judge hearing the divorce proceedings that it was preferable for access of the child to be granted to the respondent only if the child wished it. Instead the petitioner had on her own volition prayed for sole guardianship custody care and control of the child with reasonable supervised access to be C given to the respondent. At no time did the petitioner beseech the court to allow access only if the child wished for it. The court had considered the relief prayed for and had disposed of the issue of access to the child as early as 31 October 2022. In the event the petitioner wife is dissatisfied with cl 3 of the D order granted on 31 October 2021, then an appeal against such order ought to have been lodged within the stipulated time.

[38] There is an added point to call intention to which is that the respondent is only allowed to have supervised access for a mere two hours. He has no E freedom of unlimited access to the child. The proposed variation sought by the petitioner is vague and open ended. When will the child ever be willing to have access with the respondent. Worse still the proposed variation can be open to abuse and manipulation to restrict the respondent from having any meaningful relationship with his only child at any time in the future. The court cannot lend F itself to such an unfair condition.

[39] In any event it is pertinent to note that the respondent had not protested nor raised any objections to the fact that the child refuses to meet him. It would appear that he is reconciled to the state of matters. It has been G one year since the order for supervised access was granted and since then he has not taken any steps to remedy the situation. Thus, I would venture the opinion that his conduct over this period of time has given rise to the inference that he is prepared to be patient until the child is ready to meet him. Therefore, the petitioner should not be overly anxious that the access visits have been H unsuccessful thus far.

CONCLUSION

[40] In light of the foregoing it is the finding of this court that the petitioner I wife has failed to prove on a balance of probabilities that there is a material change in circumstances which would warrant a variation of the order of court dated 31 October 2022. Hence this court finds that the petitioner wife has not proven any of the grounds relied upon in order to satisfy this court to vary the order on the access of the child as prayed for.

[41] Based on those reasons, the petitioner wife's application in encl 117 is dismissed with no order as to costs. **A**

Application dismissed.

Reported by Ashok Kumar **B**

C

D

E

F

G

H

I